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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re DANIEL BARRIOS, on Habeas Corpus.	H034677 (Santa Clara County Super. Ct. No. 102661)

In this appeal, we review whether the superior court properly granted Daniel Barrios's petition for habeas relief arising out of a 2007 hearing before the Board of Parole Hearings (the Board).

In 1986, Daniel Barrios (Barrios), currently a California state prison inmate, pleaded no contest to second degree murder. He was sentenced to an indeterminate term of 15 years to life in state prison. His minimum eligible parole date was August 15, 1995, nearly 15 years ago.

Appellant, Michael Martel, the acting warden of Mule Creek State Prison where Barrios is incarcerated, appeals from an order of the Santa Clara County Superior Court granting habeas relief to Barrios.[1] With modifications, we affirm the order of the superior court.

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[1] Generally, although a habeas petition is "directed to the person having custody of or restraining the person on whose behalf the application is made" (Pen. Code, § 1477), Barrios challenged the actions of the Board of Parole Hearings. Accordingly, we refer to appellant as the Board.

Background

Following his fifth denial of parole, Barrios, in pro per filed a petition for writ of habeas corpus in Santa Clara County Superior Court.[2] On September 2, 2008, the superior court issued an order to show cause (OSC) why the petition should not be granted.

On October 7, 2008, the Board filed a return in which the Board argued that its November 27, 2007 decision finding Barrios unsuitable for parole was supported by "some evidence" that Barrios currently remains an unreasonable threat to public safety. The Board asserted that it based its denial partially on the commitment offense and made factual findings about the crime using the probation officer's report. Specifically, the Board found that "the commitment offense was carried out in a dispassionate, calculated manner, noting the facts of the crime and that Barrios was an active participant in the plan."

Subsequently, after the court appointed counsel to represent Barrios, on July 31, 2009, Barrios filed a traverse in which he asserted that the Board relied on the commitment offense and "[m]ost of what was read into the record consists of how the police came to discover the body of the victim and of how they learned the identity of Mr. Barrios and his codefendant. Virtually no evidence was elicited at the parole consideration hearing concerning the manner in which the commitment offense was committed, nor Mr. Barrios' [sic] role therein. However, Mr. Barrios did testify at the hearing that he struck the victim only once with a superficial blow that only scratched the victim. There is no other available evidence concerning the nature and extent of Mr. Barrios' [sic] participation in the life crime."

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[2] In 1994 Barrios was scheduled to appear before the Board, however, he stipulated to a two year denial. In 1996, Barrios appeared before the Board and received a three year denial. In 1999, Barrios stipulated to a three year denial. In 2002, Barrios did not appear before the Board and received a four year denial.

On August 12, 2009, the superior court granted Barrios's petition for writ of habeas corpus and ordered the Board to provide him a new hearing within 95 days and " 'to reconsider [Barrios]'s parole suitability in light of *In re Lawrence* and *In re Shaputis*.' " The court went on, "[i]f the Board chooses to again deny parole the Board must 'articulate a rational nexus between its factual findings and a conclusion.' " Further, "[i]f the Board again invokes the crime itself the Board must 'isolate the parts of [Barrios]'s commitment offense that qualified for invocation of an unsuitability factor or factors and state the nexus between the factor or factors and the ultimate decision of current dangerousness.' "

On September 8, 2009, the Board filed a notice of appeal. On application of the Board by petition for writ of supersedeas, this court granted a stay of the superior court's order.

The Board's Regulatory Scheme and this Court's Scope of Review

Penal Code section 3041, subdivision (a) states that the Board, prior to the inmate's minimum eligible parole release date shall meet with the inmate and "shall normally set a parole release date . . . ." California Code of Regulations, title 15, section 2402, subdivision (b) sets forth the manner in which an inmate's suitability for parole is to be determined by the Board. Section 2402, subdivision (a)[3] states that "[r]egardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison."

Section 2402, subdivision (c) identifies six nonexclusive circumstances *tending to show unsuitability*, the relative importance of which "is left to the judgment of the panel."

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[3] Unless noted, all undesignated regulation and section references are to Title 15 of the California Code of Regulations.

One of the specified circumstances is "(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner."[4]

Factors that support a finding that the prisoner committed the offense in an especially heinous, atrocious, or cruel manner include the following: "(A) Multiple victims were attacked, injured, or killed in the same or separate incidents; [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; [¶] (C) The victim was abused, defiled, or mutilated during or after the offense; [¶] (D) The offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense." (§ 2402, subd. (c)(1).)

In *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658 (*Rosenkrantz*), our Supreme Court held that "the judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . in conducting such a review, the court may inquire only whether *some evidence* in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation. If the decision's consideration of the specified factors is not supported by *some evidence* in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law." (Italics added.)

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[4] The remaining circumstances are "(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age. [¶] (3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others. [¶] (4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim. [¶] (5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense. [¶] (6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail." (§ 2402, subd. (c).)

Before its opinions in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), the California Supreme Court had held that this " 'some evidence' standard is extremely deferential." (*Rosenkrantz, supra,* 29 Cal.4th at p. 665.) "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor [or Board]. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor [or Board], but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the [Board]'s decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's [or Board's] decision." (*Id.* at p. 677.) In *Lawrence* and *Shaputis*, the court clarified, but did not overrule, this scope of review.

In *Lawrence*, the inmate's commitment offense was a result of her having an affair with a dentist. The dentist ended the affair and told the inmate that he was staying with his wife. Armed with a gun and potato peeler, the inmate confronted the dentist's wife, shot her, and repeatedly stabbed her with the potato peeler. The inmate fled and remained a fugitive for 11 years. After turning herself in and being sentenced to life in prison, the inmate became an exemplary prisoner, had no discipline violations, took numerous self-help classes, and had positive psychological examinations. The Board granted her parole three times, but the Governor reversed the decision each time. In 2005, the Board granted parole for the fourth time, and the Governor again reversed the decision. The Governor found that the inmate (1) remained an unreasonable safety risk due to the callous nature of the commitment offense, (2) had had some negative

psychological evaluations when she was first incarcerated, and (3) had been counseled regarding discipline problems while in prison. The Court of Appeal reversed the Governor's decision, finding that the Board had properly determined that defendant was suitable for parole. The Supreme Court granted review to resolve the dispute that had arisen in several appellate court cases as to the appropriate scope of review. (*Lawrence, supra,* 44 Cal.4th at pp. 1190-1192.)

Before *Lawrence*, some cases had interpreted *Rosenkrantz* to require that a parole denial must be upheld if "some evidence" supported one of the circumstances tending to establish unsuitability for parole such as that the commitment offense was particularly egregious. (See *In re Bettencourt* (2007) 156 Cal.App.4th 780, 800; *In re Andrade* (2006) 141 Cal.App.4th 807, 819; *In re Burns* (2006) 136 Cal.App.4th 1318, 1327-1328.) Other cases had interpreted *Rosenkrantz* to require that "some evidence" supported the ultimate determination that the inmate remained a current threat to public safety. (See *In re Lee* (2006) 143 Cal.App.4th 1400, 1409; *In re Scott* (2005) 133 Cal.App.4th 573, 595; *In re Elkins* (2006) 144 Cal.App.4th 475, 499.)

In *Lawrence*, the Supreme Court reasoned that "[i]f we are to give meaning to the statute's directive that the Board *shall normally* set a parole release date ([Pen. Code,] § 3041, subd. (a)), a reviewing court's inquiry must extend beyond searching the record for some evidence that the commitment offense was particularly egregious and for a mere *acknowledgment* by the Board or the Governor that evidence favoring suitability exists. Instead, under the statute and the governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public. [¶] Accordingly, when a court reviews a decision of the

Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence, supra,* 44 Cal.4th at p. 1212.)

The *Lawrence* court discussed the appropriate weight to be given to the commitment offense. Thus, in evaluating the crime, "it is not the circumstance that the crime is particularly egregious that makes a prisoner unsuitable for parole—it is the implication concerning future dangerousness that derives from the prisoner having committed that crime." (*Lawrence, supra,* 44 Cal.4th at pp. 1213-1214.)

The *Lawrence* court went on to state, "although the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Lawrence, supra,* 44 Cal.4th at p. 1214.) The court continued, "[a]bsent affirmative evidence of a change in the prisoner's demeanor and mental state, the circumstances of the commitment offense may continue to be probative of the prisoner's dangerousness for some time in the future. At some point, however, when there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness." (*Id.* at p. 1219.)

The *Lawrence* court recognized that despite an egregious commitment offense, "it is evident that the Legislature considered the passage of time—and the attendant changes

in a prisoner's maturity, understanding, and mental state—to be highly probative to the determination of current dangerousness." (*Lawrence*, *supra*, 44 Cal.4th at pp. 1219-1220.) Finally, the *Lawrence* court concluded: "In sum, the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Id.* at p. 1221.)

In applying this scope of review to the facts in *Lawrence*, *supra*, 44 Cal.4th 1181, the court concluded that, although the crime committed by the inmate was egregious, it rejected that other factors—prior poor psychological evaluations and being counseled eight times for misconduct such as being late to appointments—supported that the inmate was currently dangerous. Accordingly, the *Lawrence* court concluded: "[E]ven as we acknowledge that some evidence in the record supports the Governor's conclusion regarding the gravity of the commitment offense, we conclude there does not exist some evidence supporting the conclusion that petitioner *continues* to pose a threat to public safety." (*Id.* at p. 1225.) "When, as here, all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and

current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Id.* at pp. 1226-1227.)

In a companion case, the Supreme Court applied the scope of review set forth in *Lawrence.* In this companion case, the inmate had a long history of domestic violence and eventually shot and killed his second wife. The other factors of unsuitability and suitability were that the inmate had (1) a long criminal history (but the instant offense had resulted in his first felony conviction), (2) severe substance abuse problems, (3) little contact with his family throughout his incarceration, (4) participated in self-help programs, (5) been discipline free throughout his incarceration, and (6) positive psychological examinations. The Board initially denied parole, citing to the callous nature of the crime and the fact that the inmate had a history of domestic violence. The superior court upheld the Board's ruling, but the Court of Appeal reversed the decision after finding that the Board had erred in concluding that the inmate was not suitable for parole. The Court of Appeal ordered a new parole hearing, the Board thereafter granted parole, but the Governor reversed the Board. After the Court of Appeal reversed the Governor's decision, the Supreme Court granted review. (*Shaputis*, *supra*, 44 Cal.4th at pp. 1245-1251.)

The *Shaputis* court reiterated what it had held in *Lawrence*. The court stated: "[T]he proper articulation of the standard of review is whether there exists 'some evidence' that an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor." (*Shaputis*, *supra*, 44 Cal.4th at p. 1254.) The *Shaputis* court explained the proper scope of review as follows. "When a court reviews the record for some evidence supporting the Governor's conclusion that a petitioner currently poses an unreasonable risk to public safety, it will affirm the Governor's interpretation of the evidence so long as that interpretation is reasonable and reflects due consideration of all relevant statutory factors." (*Id.* at p. 1258.) In applying that standard to the facts in *Shaputis*, the court concluded that the inmate was not suitable

for parole due to both the aggravated circumstances of the commitment offense, and " 'his lack of insight into the murder and the abuse of his wife and family.' " (*Id.* at pp. 1255, 1259-1260.)

When a superior court grants relief on a petition for writ of habeas corpus without an evidentiary hearing, as happened here, the question presented on appeal is a question of law, which we review de novo. (*In re Zepeda* (2006) 141 Cal.App.4th 1493, 1497; *In re Rosenkrantz, supra*, 29 Cal.4th at p. 677 [if the trial court grants relief on a petition for writ of habeas corpus challenging a denial of parole based solely upon documentary evidence a reviewing court independently reviews the record].)

Background

The Life Crime[5]

The details of the actual murder are scant, other than to note that the body of the victim was found under a bridge at Mathson Middle School. Investigating officers found "a mound of dirt shaped somewhat like a human body." After searching the ground one of the officers found what appeared to be a human hand. One of the witnesses that had reported to the police that there was a body at the Middle School, Loretta Rodriguez, told investigating officers that she had had a conversation with Isaac Flores and Fernando Garcia, one of whom or maybe both had stated that "they had possibly 'sliced' someone in the neck or cut his throat."

Rodriguez told the police that Flores said that his girlfriend was pregnant and he had owed the victim some money. After Flores left, Garcia told Rodriguez that Flores was angry because the victim had "been with" Flores's girlfriend. Rodriguez told the police that Flores had shown Garcia where the body was located and told him that

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[5] The summary of the commitment offense is taken from the record of Barrios's November 27, 2007 parole hearing. In turn, this summary appears to be taken from the probation officer's report in this case, which in turn, was based on information obtained from a crime report from the San Jose Police Department. Since Barrios pleaded no contest in this case, there is no trial transcript.

someone else took the victim under the bridge and "after the victim became drunk, they slice[d] him in the neck."

A second witness, Audrey Baca, confirmed that she saw Rodriguez talking with Flores and Garcia. When the police interviewed Garcia, he stated that Flores had come to his house on June 20, 1985, and approximately 10 minutes later, Rodriguez arrived. During the three way conversation that ensued, Flores "acted scared and began crying." Garcia said that Rodriguez had heard some of the story directly from Flores, but he explained the rest of the story after Flores left.

Garcia said that Flores had told him that he and a partner named "Chuck" had stabbed to death and buried the victim. Flores had told Garcia that they got the victim high, after which Chuck stabbed him somewhere around the neck. Garcia then said that Flores may have said he stabbed the victim instead of Chuck.

At some point Barrios "aka Chuck" was interviewed by the police. He told the police that Flores told him the victim had "gotten his girlfriend drunk and raped her, further advising he [Flores] owed the victim or his brother some money." Furthermore, Barrios admitted to being at "crime suspect Issac Flores' [sic] house when crime suspect Flores indicated he found out some guy raped his girlfriend at a party approximately two weeks before, and Flores was going to kill him."

Barrios told the police that "Flores asked him to accompany him, however, Barrios did not accept the offer. Approximately, 30 minutes later crime suspect Flores returned to the house, stating he had stabbed and killed this guy in the creek. . . . Barrios stated this was the extent of his knowledge regarding the incident."

The Hearing

A member of the Board read a summary of the commitment offense into the record. The Board noted that Barrios was approximately 18 years old at the time of the crime.

The Board reviewed Barrios's family history; Barrios is not married, but has one son. The Board noted that Barrios had started using marijuana, "but then [he] had a problem with PCP." Barrios admitted that was the case. The Board indicated that the victim's autopsy report showed that the victim had PCP in his blood at the time of the killing. Barrios confirmed that he smoked PCP with Flores, but stated he did not know how the victim took PCP.

The Board went on to note that Barrios's probation report did not describe his employment history and wanted to know how he got the money to support his PCP use. Barrios explained that he worked full time; looking back he had a substance abuse problem. He dropped out of school to support his son, working as an auto detailer, but he lived with his parents.

Next the Board turned to Barrios's behavior and programming in prison. The Board confirmed that Barrios had not appeared at any hearings since his initial parole hearing in 1996. The Board noted that Barrios was received at Mule Creek State Prison on November 20, 1997. His custody level at the time of the hearing was "medium A" and his revised classification score was 19. From July 31, 2002 to July 30, 2003, Barrios worked as a painter and received above average to exceptional work supervisor's reports. There were no disciplinary issues during this period, no self-help or therapy and no psychiatric help. From July 31, 2003, to July 30, 2004, nothing changed except that Barrios began attending "Criminals and Gang Members Anonymous, a Twelve Step program" (CGA meetings). Barrios attended all 12 meetings. From July 31, 2004, to July 30, 2005, Barrios continued to attend CGA meetings and started attending a narcotics anonymous 12-step program (NA). Through until July 31, 2007, Barrios remained disciplinary free, received exceptional work supervisor's reports and continued with CGA and NA meetings. In addition, Barrios attended anger management classes.

Barrios told the Board that since July 31, 2007, he continued to work as a painter and continued to attend NA and CGA. In his spare time he paints and draws.

The Board reviewed Barrios's vocational training, which consisted of 803.5 hours including shoe repair training. Barrios had been a lead cook, a tier tender and a line server, and a Basic Education clerical porter, but had been a painter for most of the time. The Board pointed out Barrios had not received his GED. Barrios explained that they had stopped the "Home Studies" course so he was going to enroll in the education classes.

The Board asked Barrios if in his anger management classes he had been able to identify the "triggers" or things that brought out his anger. Barrios said that he had not, so the Board told him he needed more anger management.

Barrios's last "115" was in June 1999, and his last "128" was in February, 2001. [6]

As to Barrios's latest psychological evaluation by Dr. Weber, the Board noted that factors that increased Barrios's risk for violence were his "gang lifestyle," "significant criminal history" and drug use.[7] The factors that decreased Barrios's risk for violence included the fact that he had "successfully participated in work, vocational, self-help and education programs while incarcerated. Due to his age and length of incarceration, he is statistically unlikely to be violent if he paroles." Further, "Barrios last 115 for violence was in 1997," and "has been disciplinary free since 1999, indicating he's learned to control his behavior." Moreover, Barrios "has maintained strong family bonds throughout his years of incarceration." Dr. Weber concluded that "Barrios is in the low risk category, lowest possible for violence should he parole. However, due to his risk for

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[6] A CDC Form "115" documents misconduct believed to be a violation of law that is not minor in nature, while a CDC Form "128" documents incidents of minor misconduct. (Cal.Code Regs., tit. 15, § 3312, subd. (a)(2); *In re Gray* (2007) 151 Cal.App.4th 379, 389.)

[7] We find nothing in the record that indicates that Barrios has any criminal history. The probation officer's report from 1986 shows that Barrios had been supervised by the Gang Crimes Investigation/Supervision Program at the Juvenile Division of the Probation Department. However, there is nothing in the probation officer's report that shows that Barrios had a "significant criminal history."

relapse on drugs, he is in the upper range of the low risk category. He would most likely have little difficult [*sic*] reintegrating into the community due to his strong family support."

Dr Weber noted that Barrios "has only a fair amount of insight into the factors that led to his criminal lifestyle. He said that he joined a gang to "fit in" but failed to adequately explain why he chose to participate in criminal activities."

As to Barrios's parole plans, he plans to reside with his parents Cruz and Jorge Barrios in San Jose. In a letter to the Board, Barrios's sister Anna stated that her husband worked in construction and was willing to give Barrios a job. In another letter, Barrios's son indicated that he could provide his father with a job at the dry wall business at which he worked.

After deliberating, the Board concluded that Barrios was not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. The Board stated "in analysis of this particular homicide, it was carried out in a dispassionate, calculated manner, as one of the crime partners suspected [the victim] of having sex with his girlfriend and solicited the help of others in getting the victim sedated, under the influence of PCP. Taking him out to a remote area and ending his life through multiple stab wounds, many of which were life threatening." [¶] The inmate was an active participant in that plan. Regardless on the level of his knowledge, he was present, he participated. The offense was carried out in a manner that demonstrated an exceptional callous disregard for human suffering. Mr. Barrios' [*sic*] motive is inexplicable and unreasonable by societal standards and those are the areas you need to work on."

The Board did commend Barrios on his institutional behavior.

Discussion

The Board's decision identified an immutable factor to deny Barrios parole, the commitment crime, but failed to relate the identified immutable factor to circumstances

that would make them probative of Barrios's current dangerousness. (See *Shaputis*, *supra*, 44 Cal.4th at p. 1260 [decision must reflect "*due consideration of specified factors* as applied to the individual prisoner in accordance with applicable legal standards"].) "[T]he aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness . . . ." (*Lawrence*, *supra*, 44 Cal.4th at p. 1214.) "[M]ere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Id*. at p. 1227.) Immutable facts, such as the circumstances of the commitment offense, may be relied upon but must be related to the ultimate determination of current dangerousness. (See *id.* at p. 1221.) " '[D]ue consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Id*. at p. 1210.)

At the outset, we do take issue with the Board's evaluation of the aggravated nature of the commitment offense, which appears to be the primary ground upon which it denied parole. The Board characterized the commitment offense as "carried out in a manner that demonstrated an exceptional callous disregard for human suffering." Although this court may not weigh or reweigh the evidence, or decide credibility, it must decide whether there is some evidence in the record to support the Board's factual findings. (*In re Lawrence, supra,* 44 Cal.4th at p. 1212.) The Board's finding is not supported by any evidence. It seems that the Board's finding was based on the fact that the victim was "buried in loose soil." As this court has explained before, "[s]econd degree murder requires express or implied malice-i.e., the perpetrator must kill another person with the specific intent to do so; or he or she must cause another person's death by intentionally performing an act, knowing it is dangerous to life and with conscious disregard for life. [Citations.] For this reason, it can reasonably be said that *all* second

degree murders by definition involve some callousness-i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and suffering of others. [Citation.]" (*In re Smith* (2003) 114 Cal.App.4th 343, 366.) "The measure of atrociousness is not general notions of common decency or social norms, for by that yardstick all murders are atrocious." (*In re Lee, supra,* 143 Cal.App.4th at p. 1410.) Here, there is no evidence that Barrios acted with cold, calculated, dispassion;[8] or that he tormented, terrorized, or injured the victim before deciding to stab him; or that he gratuitously increased or unnecessarily prolonged his pain and suffering.

However, as discussed at length in *Lawrence* and *Shaputis,* the nature of Barrios's commitment offense was a valid basis for denying parole only if there was no affirmative evidence of a change in Barrios's demeanor and mental state since the time of the offense. The Board here was obligated to weigh the commitment offense, and other factors that it considered, against factors tending to show suitability for parole (see § 2402, subd. (c))—to determine whether, on balance, *currently,* Barrios poses an unreasonable risk of danger if released on parole.

Nevertheless, the Board argues that there is some evidence supporting its decision that Barrios poses an unreasonable risk of danger to society if released from prison. Specifically, the Board argues that "[t]he interrelation of the commitment offense, Barrios's lack of insight about the commitment offense, and ability to benefit from further self-help and therapy, developing a relapse prevention plan, re-starting education and trying to make post-release employment plans, are some evidence supporting [its] conclusion that he presents a current risk to public safety and is not suitable for parole."

First, we point out that the Board's attempt to compare this case to *Shaputis* is unavailing. In *Shaputis, supra,* 44 Cal.4th 1241, as noted the defendant shot and killed his wife. The California Supreme Court determined that "some evidence in the record

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[8] In fact the Board acknowledged that Barrios "did not plan the killing" of the victim.

support[ed] the Governor's conclusion that [Shaputis] remain[ed] a threat to public safety in that he ha[d] failed to take responsibility for the murder . . . , and despite years of rehabilitative programming and participation in substance abuse programs, ha[d] failed to gain insight into his previous violent behavior. . . ." (*Id.* at p. 1246.) Although the evidence was to the contrary, Shaputis nevertheless insisted the shooting had been an accident. The Supreme Court determined that, due to Shaputis's attitude and prior conduct, the commitment offense was not "an isolated incident, committed while [Shaputis] was subject to emotional stress that was unusual or unlikely to recur. . . . Instead, the murder was the culmination of many years of [Shaputis's] violent and brutalizing behavior toward the victim, his children, and his previous wife." (*Id.* at p. 1259.) In addition, Shaputis had "found 'inexplicable' his daughters' prior allegations of molestation and domestic violence [and] had a flat affect when discussing these allegations[.]" (*Id.* at p. 1252.)

Unlike in *Shaputis, supra,* 44 Cal.4th at pages 1251-1252, where the defendant had a " 'schizoid quality to interpersonal relationships,' " Barrios has no such history; according to Dr. Weber, "[t]here is no evidence of a more disabling personality disorder" than "an antisocial personality disorder" that has "improved significantly with maturity and growth."

Second, the Board did not make an explicit finding that Barrios lacked insight into his crime. Rather, the Board recommended that Barrios should work on his insight into why he got involved in this crime. Even if this court were to find that this was an implicit finding, again the Board fails to explain how that makes Barrios currently dangerous.

Furthermore, although Barrios may benefit from further self-help and therapy (although Dr. Weber did note that he is not in need of further therapy programs), the Board does not explain how lack of these programs is probative of Barrios's current dangerousness.

Nevertheless, it is important to note that the Board rendered the decision in this case before *Lawrence* and *Shaputis* were decided. In these circumstances, we cannot presume that the Board applied the evidentiary standard as clarified by *Lawrence* or that it would have reached the same conclusion had it done so. Accordingly, remand is warranted.

In remanding the matter to the Board, the superior court ordered that the Board provide Barrios a new hearing within 95 days and to reconsider Barrios's " 'parole suitability in light of *In re Lawrence* and *In re Shaputis*.' " The Board went further and ordered that if the Board again chose to deny parole, the Board must articulate a rational nexus between its factual findings and a conclusion. Moreover, if the Board again invokes the crime itself "the Board must 'isolate the parts of [Petitioner]'s commitment offense that qualified for the invocation of an unsuitability factor or factors and state the nexus between the factor or factors and the ultimate decision of current dangerousness."

In its reply brief, the Board recognizes that this court is "likely" to remand the matter back to the Board to conduct a new parole consideration hearing, but argues that at the very least this court should modify the superior court's order in two ways. First, the Board contends that the superior court indicated that the Board must state why there is no nexus between positive reliable information and affirmative suitability. Second, the Board contends that the superior court noted that Barrios's psychological report assessed him as a low risk, but noted that the Board " 'apparently ignored' " and " 'did not mention this at the hearing.' " The court found that was error under the nexus test of such magnitude that the Board's decision should be reversed. The Board asserts that this court should strike this paragraph from the order.

We point out that the things with which the Board takes issue are contained in the section of the "order" outlining the superior court's reasoning for remanding the matter to the Board for a new hearing and are not actual orders to the Board. The superior court's

order is contained in the section designated DISPOSITION. Nevertheless, to avoid any confusion we will order the superior court to modify its order to the Board.

We are mindful that our judicial review of a parole decision must be exercised carefully so that it does not violate the separation of powers by intruding upon the executive branch's broad discretion in parole-related matters. (See, e.g., *In re Lugo* (2008) 164 Cal.App.4th 1522, [order requiring Board to state a significant change in circumstances justifying decision to deny parole for more than one year following a prior one-year parole denial violated separation of powers doctrine]; *Hornung v. Superior Court* (2000) 81 Cal.App.4th 1095, 1099 [court order allowing inmate to question commissions about their parole-related decision process violated separation of powers]; *In re Masoner* (2009) 172 Cal.App.4th 1098 [trial court's order directing inmate's release violated separation of powers because Board must be given opportunity to determine if new evidence of his conduct or change in his mental state support a determination that he is currently dangerous].)

However, for the guidance of the Board, we reiterate, " 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence*, *supra*, 44 Cal.4th. at p. 1210.) This is what due process requires. (*Lawrence, supra,* 44 Cal.4th at p. 1212.)

Furthermore, we remind the Board that "in directing the Board to consider the statutory factors relevant to suitability, many of which relate to postconviction conduct and rehabilitation, the Legislature explicitly recognized that the inmate's threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law." (*Lawrence, supra,* 44 Cal.4th at p. 1219.)

Disposition

The matter is remanded to the superior court with directions to modify its order granting Barrios's petition for habeas corpus. The superior court shall modify its order to the Board as follows: "The Board of Parole Hearings is directed to vacate its 2007 parole decision and to hold a new hearing and issue a new decision within 95 days of this order. The Board shall proceed in accordance with due process in light of *In re Lawrence* (2008) 44 Cal.4th 1181, and *In re Shaputis* (2008) 44 Cal.4th 1241, taking into account all relevant statutory factors. Further, the Board is directed that it shall articulate a rational nexus between its factual findings and a conclusion that petitioner is not suitable for parole. The court is directed to forward a copy of the order as modified to the Board."

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.